IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 29887 of 2007

For Approval and Signature:
HONOURABLE MR.JUSTICE H.K.RATHOD **Sd/-**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? **YES**

2 To be referred to the Reporter or not ? **YES**

3 Whether their Lordships wish to see the fair copy of the judgment ? **YES**

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? **NO**

5 Whether it is to be circulated to the civil judge ? **NO**

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MUNICIPAL COMMISSIONER, VADODARA MAHANAGAR SEVA SADAN - Petitioner(s)
Versus
VINODBHAI GORDHANBHAI SOLANKI - Respondent(s)

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Appearance :
MR NILESH A PANDYA for Petitioner(s) : 1,
None for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE H.K.RATHOD

Date : 13/12/2007

ORAL JUDGMENT

1. Heard learned advocate Mr. Nilesh A. Pandya appearing on behalf of petitioner.

2. In the present petition, petitioner has challenged the award passed by Labour Court, Vadodara

in Reference (LCV) No. 785 of 1999 dated 5th March 2007. The Labour Court has directed the petitioner to reinstate the employee at his original post with 25% backwages with continuity of service.

3. Learned advocate Mr. Pandya submitted that during the probation period from 26th January 1996 to 26th November 1998, the respondent was remained absent about 272 days without prior permission of the authority. Therefore, his service was terminated while not extending the further period of probation. He further submitted that Labour Court has committed error applying the legal fiction of deemed confirmation after completion of two years of probation period. He also submitted that after two years period, no confirmation order is issued by petitioner. He also submitted that respondent was remained absent and during the absent period, two years probation period was over on 15th January 1998, but, because of absenteeism, the order of termination was passed w.e.f. 26th November 1998 and that interim period from 15th January 1998 to 26th November 1998 is extended by the Corporation. Therefore, he submitted that in fact, there was no need for extension of the probation period, because, his service was terminated on the date, on which, he completed two years period, because, his appraisal report submitted by the authority suggested that his service is required to be terminated. Therefore, Labour Court has committed gross error in deciding the reference and granting the relief in favour of respondent.

4. I have considered the submissions made by learned advocate Mr. Pandya and I have perused the award passed by Labour Court, Vadodara. The facts are not much in dispute between the parties. The statement of claim was filed by respondent vide Exh.4 before the Labour Court.

5. According to respondent, he was serving as Sweeper in Ward No.8 in Sanitary Department. His salary was Rs.3650/- per month and he was dismissed from service on 26th November 1998 by the petitioner. The respondent was appointed on compassionate ground by the Corporation. According to respondent, he was permanent employee and getting all the benefits, because, his father was also serving as permanent employee. According to respondent, his service was terminated because of denying the permanent benefit to the respondent by the petitioner.

6. The petitioner Corporation has filed written statement vide Exh.13 and raised contention that respondent employee was appointed on compassionate ground sympathetically according to policy of Corporation. During the probation period, he was remained absent for a period of 272 days as leave without pay during the period of two years. The respondent was totally negligent and careless in his service and Corporation has given frequently opportunity to respondent to improve it, but, he was not improved. Therefore, considering the probation

period comes to an end, vide order No.978/98-99, the competent officer has terminated the service of the respondent.

7. According to petitioner, management has power to terminate the service of probationer employee and for that, no departmental inquiry is necessary and there is no need to give any opportunity.

8. Both the parties were appeared before the Labour Court and oral evidence was led before the Labour Court by respondent workman and no oral evidence was led by petitioner Corporation before the Labour Court. However, both the parties have produced relevant documents on record. The termination letter of probation of employee dated 24th November 1998 Ehx.17. The appointment letter dated 10th January 1996 Exh.15 and assessment order of work of employee for the period from 16th January 1996 to 15th January 1998 is Exh.16. Thereafter, Labour Court has heard the argument from both the sides and ultimately, Labour Court has framed the issue and decided the matter. After appreciating the oral and documentary evidence, the Labour Court has considered the important aspect that service of the respondent was terminated exactly on the date, on which, he completed the probation period or not and what would be the effect if probation period is extended beyond two years period. This aspect, in detail, examined by Labour Court and come to conclusion that probation period of two years comes to end on 15th January 1998, but, his service

was terminated on 26th November 1998 and that much period was extended by the Corporation. Therefore, whether Corporation has power to extend the period beyond period of two years or not, for that, any service rules is permitted to Corporation for such extension. The Labour Court has considered that beyond two years, there is no provision made in service rules of the Corporation which gives power to the Corporation to extend the probation period. Therefore, Labour Court has come to conclusion that respondent workman is deemed to be confirmed employee, because, beyond two years period, Corporation cannot extend the probation period. If the maximum probation period is completed by the workman and his probation is not extended or his service is not terminated, then, in such circumstances, such probationer is deemed to be confirmed. That view has been taken by Labour Court.

9. According to Labour Court, the reason for dismissal given by Corporation is only absenteeism and negligence, but, looking to the appraisal report, no reprimand had been given to employee for his absenteeism. The Labour Court further observed that employee who had remained absent 'leave without pay' for a period of 272 days, but, it is for the period from 16th January 1996 to 15th September 1998. The Corporation had not produced any cogent and reliable evidence from which period to which period and for which head, he was on leave, that burden lies upon the Corporation and it is not the case of Corporation

that work, which was doing by employee, is easily available in the vicinity of area. Therefore, contention raised by Corporation that when the employee is on probation, has not right, to be confirmed. Therefore, the said contention of the Corporation has been rejected on the ground that after completion of two years probation period, the workman was remained continue in service up to 26th November 1998, then, he deemed to be confirmed as an employee of the Corporation.

10. According to Labour Court, the order of termination passed by Corporation on the absenteeism is apparently harsh, disproportionate and without any kind of justification and without any kind of adopting legal procedure and therefore, Labour Court has set aide the termination order and granted 25% backwages of interim period after considering the evidence of the workman.

11. I have considered the submissions made by learned advocate Mr. Pandya and I have also perused the award passed by Labour Court, Vadodara. Recently, identical question based on similar facts has been examined by Apex Court in case of ***Jasvantsinh Pratapsinh Jadeja v. Rajkot Municipal Corporation*** reported in ***JT 2007(12) SC 240 = 2007(7) Supreme Today 553***. The relevant facts of the above reported case are as under :

"1. Appellant was a major in the Army. He

joined the Respondent Municipal Corporation as a Vigilance Officer on or about 21.12.1999. The power to appoint on a temporary basis was conferred on the Municipal Commissioner under 2nd proviso appended to Section 53(3) of Bombay Provincial Municipal Corporation Act, 1949.

2. Appellant was put on probation for a period of six months and although there does not exist any statutory provision in this behalf, the probation period was extended from time to time.

3. Appellant proceeded on leave on and from 3.2.2003 on medical ground. The period of leave, however, expired but he did not join as allegedly he continued to suffer from the ailments. He telephonically informed his officer for extension of leave.

4. He was served with a show cause notice on or about 22.03.2003 as to why his services should not be terminated for alleged misconduct of remaining absent from duty without prior leave.

5. The cause shown by him was not found to be satisfactory and was rejected. No departmental enquiry was conducted. A finding of fact was arrived at to the effect that the

enquiry proceedings which were pending against him were not brought to its logical end. It was concluded that his period of probation was extended up to 30.4.2003 without assigning any reason whereas there was no such power in the appointing authority. His services were therefore discharged.

6. Appellant's writ application against the order of discharge was dismissed by the Gujarat High Court.“

The relevant Para 9, 11, 15, 16, 21 and 27 of above reported case are quoted as under :

“9. The tests governing termination of probation is no longer res integra. When a disciplinary enquiry is initiated on the premise that there are serious allegations of misconduct on the part of the delinquent officer; his explanation thereupon had been rejected pursuant whereto a full scale formal enquiry has been initiated culminating in a finding of guilt, the order terminating the service would be held to be stigmatic. There may also be cases where the allegations involved moral turpitude on the part of the delinquent officer. The language used in the order of termination of service may ex facie be stigmatic. The language used therein may also show that there was something over and

above the assertion that the officer was found unsuitable for the job. The aforementioned tests, however, are not exhaustive.

11. Before, however, we embark upon the legal questions, we must notice that the appellant had not been confirmed in his services from 1999 to 2003. The power of Commissioner of Municipality to appoint a person on temporary basis is governed by the statutory rules. It has not been shown before the High Court or before us as to under what provisions of law the period of probation was extended from time to time. Applicability of the provisions of the Act is not in dispute. It may be true that such a contention was not raised before the High Court, but if under the statute, the period of probation could not have been extended, he will be deemed to have been confirmed on expiry of the period of probation.

15. Such a jurisdictional fact had not been taken into consideration by the appropriate authority. Presumably, keeping in view the aforementioned provision, his probation period had not been extended after 31.2.2003. The nature and character of the order, therefore, must be considered having regard to the aforementioned statutory provision.

16. If the satisfaction of the employer rested on the unsatisfactory performance on

the part of the appellant, the matter might have been different, but in that case, from the impugned order it is evident that it was not the unsatisfactory nature and character of his performance only which was taken into consideration but series of his acts as well, misconduct on his part had also been taken into consideration therefor. It is one thing to say that he was found unsuitable for a job but it is another thing to say that he was said to have committed some misconduct.

21. This line of cases amongst others clearly goes to show that taking into consideration the factor as to whether the employee had satisfactorily performed his duties during the period of probation is a relevant factor and the same can form foundation for passing an order of discharge.

27. From the discussions made hereinbefore, it is evident that termination of services of the appellant purporting to discharge him simplicitor cannot be accepted, being stigmatic in nature. The form of the order terminating the services coupled with the background facts clearly leads to the conclusion that the order impugned in the writ petition by the appellant was punitive.“

12. This Court has also examined the said aspect in case of ***Municipal Commissioner, Baroda v. For & On Behalf of Narsing Sursinh Padhiyar*** reported in

2004(3) GLH 358. The relevant Para 8 is quoted as under :

> ***"8.*** *I have perused the entire award passed by the Tribunal. I have also considered the reasons given by the Tribunal. Mr.Desai relies upon the Resolution of the Standing Committee as well as General Board and points out that the Corporation is entitled to appoint any employee on probation for a period of one year. If his work is found satisfactory, then he is entitled for confirmation by positive order of the Corporation. If his work is not found satisfactory, and authority feels that during extended period he will improve, then Corporation can extend the period of probation and after extended period, if the work is not found satisfactory, then Corporation can terminate the services of such employee. Items 1, 2, and 5 have been accepted by the General Board and No.2 and 4 have been rejected by the General Board. Therefore, even bare reading of such Resolution, items 1 and 2, does not specifically make it clear whether maximum period is of one and half years or two years, but one extension is mentioned and not two extensions to the employee concerned, meaning thereby, Corporation is entitled to appoint an employee on probation for a maximum period of one year and one extension thereafter and not beyond that. When maximum period of*

probation is specified or fixed by the Corporation beyond that extension, there is no need to have specific or positive orders from the Corporation about deemed confirmation. Here, in the facts of this case, the maximum period is one and half years. It is not the case of the Corporation before the Tribunal that Circular dated 3.7.1973 has been cancelled by the Corporation in pursuance to the Resolution passed by the General Board. On the contrary, in written statement ex.5, averments are made to the effect that it is admitted by the Corporation that there is Circular dated 3.7.1973 which gives maximum powers to the Corporation to continue an employee on probation for a period of 18 months and not beyond that. Therefore, according to my opinion, the Tribunal has rightly relied upon the circular and passed the award in favour of the respondent-employee. Once the respondent -employee cleared the period of probation of one and half years, further extension was without authority and therefore with effect from 11.7.1984, the respondent-employee is deemed to be confirmed on the post of Accountant. Similar view has been taken by the Division Bench of this Court in the case of Yamini J.Dave v. The Director, IUCAA and anr. reported in 2004(2) GLH 1. Recently, even the apex Court has considered the very question in the case of Mir Mohammad Khasim v. Union of

India and others reported in 2004 AIR SCW 3108. The apex Court has considered the case of Commissioner of Police, Hubli v. R.S.More (supra) which has been relied on by Mr.Desai. The apex Court has observed that if rules do not prescribe any maximum period of probation beyond which it cannot be extended, then in such circumstances, after completion of such maximum period, the employee concerned is deemed to be confirmed in service. The apex Court has observed in paragraph 11 in the case of Mir Mohammad Khasim v. Union of India and others (supra) as under:

> *"...We feel that on this point a Constitution Bench decision of this Court in State of Punjab v. Dharam Singh, 1968(3) SCR 1, providing that if an employee is continued after maximum period of probation which under the rules cannot be extended any further the employee shall be deemed to have been confirmed, continues to hold the field..."*

The Division Bench of this Court has also considered the very aspect in Yamini J.Dave v. The Director, IUCAA and anr. (supra).“

13. Also, this Court has examined the said question in case of ***Yamini J. Dave v. The Director, I.U.C.A.a. & Anr.*** reported in ***2004(2) GLH 1***. The

relevant Para 14, 16 and 19 are quoted as under :

> ***"14.*** *The Hon'ble Supreme Court had an occasion to examine the issue that after completion of probation period, whether it amounts to an automatic confirmation or it requires positive decision from employer, in WASIM BEG V. STATE OF U.P. AND OTHERS [(1998) 3 SCC 321]. The Apex Court has observed that such situation would depend upon the provisions in the relevant service rules relating to probation and confirmation. Where the Rules provide for a maximum period of probation beyond which probation cannot be extended, then at the end of the maximum probation period there will be a deemed confirmation of the employee unless the rules provide to the contrary. However, even when the rules prescribe a maximum period of probation, if there is a further provision in the rules for continuation of such probation beyond the maximum period, the Courts have made an exception and said that there will be no deemed confirmation in such cases and the probation period will be deemed to be extended. There may be cases where there is no maximum period prescribed for probation and either there is a Rule providing for extension of probation or there is a Rule which requires a specific act on the part of the employer [either by issuing an order of confirmation or any similar act] which would result in*

confirmation of the employee. In these cases unless there is an order of confirmation, the period of probation would continue and there would be no deemed confirmation at the end of the prescribed probationary period. Considering the above decision of the Apex Court and looking to the facts of the present appeal, the Service Rules provide for maximum period of probation for a period of two years, initially for one year, which can be extended for a further period of one year. The probation period has been closed after completion of one year service of the appellant by the respondent. Non extension of further period of one year, means, the appellant is deemed to be confirmed employee because the Rules do not provide to the contrary. There is no provision in service rules of IUCAA which provides otherwise. The relevant observations in WASIM BEG (supra) made by the Apex Court relying upon the earlier decision in identical case in para-15 are quoted as under :

> *"15. Where an employee at the end of the probationary period automatically gets confirmation in the post or whether an order of confirmation or any specific act on the part of the employer confirming the employee is necessary, will depend upon the provisions in the relevant Service Rules*

relating to probation and confirmation. There are broadly two sets of authorities of this Court dealing with this question. In those cases where the Rules provide for a maximum period of probation beyond which probation cannot be extended, this Court has held that at the end of the maximum probationary period there will be a deemed confirmation of the employee unless Rules provide to the contrary. This is the line of cases starting with State of Punjab v. Dharma Singh, M.K.Agarawal v. Gurgaon Gramin Bank, Om Prakash Maurya v. U.P. Coop Sugar Factories Federation, State of Gujarat v. Akhilesh C. Bhargav."

16. The case of the appellant is squarely covered by the aforesaid observations of the Apex Court. The Service Rules of IUCAA No.2[1] provides for appointment and duration of service of the employee and a maximum period of probation for two years and no extension has been provided further. At the end of the probation period, appointing authority has to offer continuing appointment. In the facts of this case, after closing probation period, the appellant remained in service and as per the service rules, when period of probation is not extended, it is to be assumed that the appellant became a confirmed employee by positive act or similar act of closing of

probation period. Therefore, project appointment and contractual appointment given to the appellant by order dated 10th September, 1993 itself, in our opinion, is bad and such appointment is contrary to the public policies as the employee was not in bargaining situation because of unemployment and such order which is opposed public policy, is obviously hit by Article 14 of the Constitution of India. It is also necessary to note very important aspect that the moment the probation period has been closed after completion of one year service, due increments have been released in favour of the appellant with effect from 1st September, 1992. The periodical increment certificate produced by the appellant at page.118 - Annexure-I, wherein it is mentioned below the column, "whether the concerned employee working in substantive post or Officiating Post", that the appellant is working on "Substantive" post, that is to say, as a confirmed employee and not working even on contractual basis. Thus, from 1st September, 1992, to further period of one year, the appellant was working with respondent in substantive post [confirmed] category. This may be termed as positive action of the respondent to appoint the appellant in substantive post in question, in other words, it is similar act which has been emphasized by the Apex Court in above

referred decision and therefore, the appellant became confirmed employee.

19. Now coming to another the aspect, services of the appellant have been terminated on 9th September, 1994 on the ground that it is decided by the competent authority not to give any further extension beyond 10th September, 1994 and the appellant ceased to be in service of IUCAA / INFLIBNET programme with effect from 10th September, 1994. This decision not to extend the period of appellant is based on the decision of the Committee consisting of four persons dated 19th August, 1994. The committee, in case of the appellant, observed that she has attended the office only for 29 days during 1994 and she has been casual and careless and inspite of oral reprimand, there has not been any improvement during the period of present extension. This aspect is also reflected in her confidential report for the year 1994. On the basis of said decision, it was decided by the committee not to recommend an extension in service to the appellant and it was recommended that it will not be in the interest of the respondent to give extension to the appellant beyond present tenure. Based on the relevant observations of the recommendations of the committee, ultimately, the service of the appellant has been terminated on 10th September, 1994. Therefore, the question

is whether observations made by the Committee as "casual, careless and no improvement during extension period and to remain absent", can be said to be stigma or not ? In fact, the appellant was deemed to be a confirmed employee as observed by us above, but termination is based on such recommendations which made allegations against the appellant about misconduct and even though, no opportunity was given to the appellant and straightaway her services have been terminated by the respondent. In such circumstances, it is the duty of the Court to lift the veil to find out the real cause for termination. If real cause is an allegation or misconduct, then an opportunity has to be given following the principles of natural justice. The difference between the foundation and motive for termination has been discussed by the Apex Court in case of DIPTI PRAKASH BANERJEE V. SATYENDRA NATHBOSE NATIONAL CENTER FOR BASIS SCIENCES, CALCUTTA AND OTHERS reported in 1999 SCC Lab & Service pg.596. The relevant observations of the Apex Court in aforesaid decision in para-34 to 37 are referred as under :

> *"34. It will be seen from the above case that the resolution of the Committee was part of the termination order being an enclosure to it. But the offensive part was not really contained in the order of termination nor in the*

resolution which was an enclosure to the order of termination but in the Manager's report which was referred to in the enclosure. The said report of the Manager was placed before the Court along with the counter. The allegations in the Manager's report were the basis for the termination and the said report contained words amounting to a stigma. The termination order was, as stated above, set aside.

35. The above decision is, in our view, a clear authority for the proposition that the material which amounts to stigma need not be contained in the order of termination of the probationer but might be contained in any document referred to in the termination order or in its annexures. Obviously, such a document could be asked for or called for by any further employer for the probationer. In such a case, the order of termination would stand vitiated on the ground that no regular enquiry was conducted. We shall presently consider whether, on the facts of the case before us, the documents referred to in the impugned order contain any stigma.

36. It was in this context argued

for the respondent that the employer in the present case had given ample opportunity tot he employee by giving him warnings, asking him to improve and even extended his probation twice and this was not a case of unfairness and this Court should not interfere. It is true that where the employee had been given suitable warnings, requested to improve, or where he was given a long rope by way of extension of probation, this Court has said that the termination orders cannot be held to be punitive. [See in this connection Hindustan Paper Corpn. v. Purnendu Chakrobarty, Oil & Natural Gas Commission v. Dr.Md. S. Iskender Ali, Unit Trust of India v. T.Bijaya Kumar, Principal, Institute of Postgraduate Medical Education & Research, Pondicherry v. S. Ande and a labour case Oswal Pressure Die Casting Industry v. Presiding Officer]. But in all these cases, the order were simple orders of termination which did not contain any words amounting to stigma. In case we come to the conclusion that there is stigma in the impugned order, we cannot ignore the effect it will have on the probationer's further whatever be the earlier opportunities granted by the respondent Organisation to the appellant to improve.

> *37. On this point, therefore, we hold that the words amounting to "stigma" need not be contained in the order of termination but may also be contained in an order or proceeding referred to in the order of termination or in an annexure thereto and would vitiate the order of termination. Point 3 is decided accordingly.“*

14. In view of above observations made by Apex Court by recent decision of this Court as referred above and also while keeping in mind the reasoning given by Labour Court while appreciating the oral and documentary evidence on record, according to my opinion, Labour Court has rightly appreciated the evidence on record and rightly come to conclusion that after completion of prescribed probation period, there is no provision for Corporation which gives power to Corporation to extend the probation period. Therefore, a moment, the period is over and workman is continue in service, is deemed to be confirmed in service and no inquiry was initiated by the petitioner against the respondent. The facts of the present case which is on hand. The respondent workman was appointed as a Sweeper for a period of two years on probation. The allegations made against him to remain absent during the probation period about 272 days without prior permission. It amounts to negligence and carelessness on the part of respondent workman. The order of dismissal dated 26th November

1998 passed by competent authority considering this negligence and carelessness to remain absent for a period of 272 days without prior permission, but, before that, no reasonable opportunity of hearing was given to the workman and no departmental inquiry was initiated against the workman for proving the allegations against respondent workman. The nature of dismissal is not merely a simple termination, but, it was a stigmatic order passed by competent authority while extending the period of probation up to 26th November 1998. Two years probation period was over on 10th January 1998, but, considering the assessment order of work of employee-respondent, from 16th January 1996 to 15th January 1998, the period of probation was extended up to 26th November 1998, for which, petitioner Corporation has no power under any statutory rules to extend it beyond period of two years. Therefore, the view taken by Division Bench of this Court and learned Single Judge as well as Apex Court as referred above, the respondent employee get status as a permanent employee or confirmed employee when a moment, maximum period of two years probation was over. Therefore, subsequent to completion of two years probation period, the workman obtained the status as a confirmed employee and in such cases, if Corporation wants to terminate the service on the basis of allegation, then, detail departmental inquiry is a condition precedent as per service rules which has not been followed admittedly while terminated the service of respondent employee. The stand taken by petitioner cannot be made applicable,

because, it was not a simple termination at the end of probation period, but, it was a termination based on allegation and nature of order is stigmatic and after obtaining status as a permanent employee by legal fiction, petitioner Corporation must have to follow the procedure to hold departmental inquiry, and then, to pass appropriate orders after giving reasonable opportunity of hearing to the respondent workman. But, Corporation has not followed the procedure and workman remained continue in service beyond prescribed probation period. That entire facts have been properly appreciated and rightly dealt with by Labour Court while considering the decision of various Courts, and for that, according to my opinion, Labour Court has not committed any error which requires interference by this Court. The facts of the Apex Court decision as referred above in case of Jasvantsinh (supra) is almost identical facts to the facts of the present case, therefore, award passed by the Labour Court is perfectly justified on merits as well as on legal aspects. Therefore, Labour Court has not committed any error which requires interference by this Court under Article 227 of the Constitution of India.

15. Therefore, Labour Court has rightly granted the relief in favour of workman, for that, Labour Court has not committed any error which requires any interference by this Court under Article 227 of the Constitution of India.

16. Hence, there is no substance in the present petition. Accordingly, present petition is dismissed.

Sd/-
[H.K. RATHOD, J.]

#Dave